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JUN - 3 1996

June 3, 1996

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: Reply Comments in CS Docket 96-60

Dear Mr. Caton:

On Friday, May 31, 1996, this office filed Reply Comments on behalf of United Broadcasting Corporation, d/b/a TELEMIAMI, in the above-captioned proceeding. Page 14 of the Reply Comments was inadvertently omitted. Consequently, we hereby submit an original and 11 copies of an Erratum consisting of the entire Reply Comments, including the missing page.

Please contact the undersigned with any questions.

Very truly yours,

MILLER, CANFIELD, PADDOCK AND STONE

By Matthew C. Ames
Matthew C. Ames

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

JUN - 3 1996

In the Matter of	)	
	)	CS Docket No. 96-60
Leased Commercial Access	)	

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ERRATA

**REPLY COMMENTS OF
UNITED BROADCASTING CORPORATION,
D/B/A TELEMIAMI**

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Attorneys for United Broadcasting
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May 31, 1996

Summary

United Broadcasting Corporation, d/b/a TELEMIAMI, urges the Commission to proceed with the proposals set forth in the Further Notice of Proposed Rulemaking released on March 29, 1996 (the "FNPRM"), as modified by the additional proposals in our opening comments. The implicit fee formula and the hostility of the cable industry have smothered commercial leased access in its cradle, and the proposals contained in the FNPRM, if properly adjusted, will do much to advance the goals established by Congress.

The central goal of the leased access provisions of the Cable Act is the development of editorial diversity on cable systems. And by diversity, Congress meant multiple editorial voices, not a subjective variety of programming chosen by the cable operator.

The principal obstacle to the growth of the type of diversity envisioned by Congress has been the cable industry itself, particularly cable operators. Cable operators jealously guard their control over programming decisions and value that control beyond any price. The implicit fee formula was originally supported by the cable industry as a means of preserving that control. Even cable operators, however, now admit that the implicit fee formula is flawed. The formula leads to such high rates for leased access time that no programmer, no matter how popular or well-financed, could afford to pay them. This is not, however, an argument against leased access. To the contrary, advertiser-supported ethnic leased access programmers like TELEMIAMI can survive, as long as they do not have to pay excessive leased access rates.

Nevertheless, operators wish to preserve the implicit fee formula in some form, although they are unable to articulate sound rationales to support it. For example, the FNPRM correctly concludes that the implicit fee formula allows operators to double-count subscriber revenues. Operators try to defend this double compensation on the ground that it represents some intangible benefit that they otherwise would lose. Ultimately, however, operators want to be compensated for giving up control, even though the implicit fee's valuation of that intangible value is, by the industry's own admission, arbitrary.

The FNPRM's cost/market proposal is an enormous improvement over the implicit fee formula. If modified as suggested in our initial comments, the cost/market proposal would also meet the cable industry's alleged concerns and would provide affordable rates for leased access programmers. We propose that the Commission establish a presumptive nominal rate of no more than $0.05 per subscriber per month for a leased channel. If an operator could demonstrate that its actual costs exceeded the nominal rate using the cost/market approach, then it would have the right to charge more than the presumptive nominal rate.

Our proposal would guarantee that operators receive some compensation for every leased access channel. There would be no instances in which operators were not compensated, as they claim can happen under the cost/market formula.

Operators object to the cost/market proposal on the ground that it underestimates their opportunity costs. They claim that adding leased access channels will cause them to lose subscribers and thus lose revenue. They also object to the loss of control, because they apparently believe that only operators know what is best for subscribers.

In fact, however, there is no evidence that adding leased access channels to a system causes revenue loss. There is no reliable evidence in the record suggesting that at the margin, dropping a few channels and replacing them with different ones will have any significant effect on overall penetration. While there certainly are tier program channels that subscribers value highly, it is equally true that at the margin, there are tier programmers to which subscribers attach little, if no value. These are the ones a rational operator would drop. We urge the Commission to conduct a statistical analysis of all cable systems, comparing subscriber penetration or system revenues for systems that carry leased access channels to those that do not.

In addition, operators claim that all leased programming is undesirable are not true. Nielsen data for our programming shows that, despite our limited reach on only four cable systems, we are the most widely-viewed cable-only Hispanic programmer in the Miami area. Yet inexplicably, most operators refuse to carry us unless we pay the implicit fee. Our programming adds value, and if operators are to be compensated for the allegedly deleterious effects of leased access, the formula must also take into account the positive effects of programming such as ours. More generally, industry criticisms of leased access programming are hypocritical: cable operators carry their own share of duplicative programming, infomercials, home shopping channels, and other programming that they apparently view as undesirable when aired on leased access.

The solution to operators' fears that leased access will be taken over by infomercial and home shopping channels is to preserve the separate program categories in the current rules. This will ensure that local, ethnic advertiser-supported programmers like

TELEMIAMI will not have to compete directly with programmers with much larger cash flows.

It is not true, as the cable industry claims, that the cost/market formula subsidizes leased access programmers. As discussed above, leased access does not harm cable operators, and a leased access programmer gets no greater benefit from carriage on a system than any other programmer. It is difficult to see how a leased access programmer that pays for carriage can be said to be subsidized, when other programmers are generally paid by the operators.

Finally, we urge the Commission to (i) require operators to accept programmers on a first-come, first-served basis: (ii) permit resale of leased access time; (iii) require leased access programmers to be placed on the basic or CPS tier; and (iv) allow leased access contracts to extend longer than one year and rates to be revised only upon expiration of a contract.

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REPLY COMMENTS OF
UNITED BROADCASTING CORPORATION,
D/B/A TELEMIAMI

Introduction

United Broadcasting Corporation, d/b/a TELEMIAMI, again applauds the Commission's efforts to revise its leased access rules and urges the Commission to stand fast in the face of opposition from cable operators and cable programmers. The industry's opening comments confirm what we stated in our initial comments: the cable industry is unalterably opposed to commercial leased access, and will do everything in its considerable power to stymie leased access. The bulk of the industry's arguments consist of attacks on the very concept of leased access itself rather than attacks on the Commission's proposals. The Commission, however, is charged with implementing and upholding the law, Section 612, not -- as the industry would believe -- writing the provision out of existence. We urge the Commission to adopt the proposals set forth in the Further Notice of Proposed Rulemaking of March 29, 1996 (the "FNPRM"), with the modifications suggested in our initial comments.

I. THE TERM "DIVERSITY" REFERS TO A VARIETY OF EDITORIAL VOICES, NOT TO A SUBJECTIVE ASSESSMENT OF THE VARIETY OF PROGRAMMING SELECTED BY THE CABLE OPERATOR AS THE SOLE EDITORIAL GATEKEEPER.

Time and time again, cable industry commenters -- both operators and established programmers alike -- put forth the false claim that when Congress spoke of "diversity" in Section 612, it meant subjective assessment of the variety of programming carried on a cable system. See, e.g., Comments of Time Warner Cable at 25-27; Comments of C-SPAN and C-SPAN2 at 5-8; Joint Comments of Turner Broadcasting Systems, Inc., et al., at 3. This is simply not true. In 1984, Congress created leased access out of concern about the bottleneck editorial control a cable operator inherently has over the programming that appears on its system. Leased access was intended to provide an avenue for editorial access to the system outside of the operator's bottleneck control. In 1992. Congress reiterated this concern when it stated that leased access "is an important safety valve for anticompetitive practices." S.Rep. No. 92, 102nd Cong. 1st Sess. at 31-32 (1992).

If Congress had been concerned only with the subjective diversity of programming output on cable systems, leased access would never have been necessary. The original three networks always produced a variety of different types of programming. At the time the Cable Act was adopted, there were already a number of established cable networks. Surely there was a large variety of programming available even then. What Congress was trying to avoid was a situation in which only the cable operator could decide what viewing choices its subscribers had. Indeed, it is the battle over whether operators will retain complete bottleneck control that the Commission is faced with now.

Reduced to their essence, the industry's arguments in favor of the implicit fee formula and against the cost/market formula largely turn on whether operators are being properly compensated for the loss of bottleneck control over programming. We will discuss this in more detail below, but the Commission should keep in mind that that is what the fight is all about. When operators talk about the supposed diversity of the programming carried on their systems, they are merely trying to convince the Commission to ignore the fact that the operators -- and only the operators -- decide what subscribers get to watch.

Some operators have argued that the programming affiliation rules adopted pursuant to Section 628 of the Cable Act have resolved the diversity question, and that the fact that a number of cable networks are not owned by cable operators is proof that diversity has been achieved. In fact, this is not true. If it were, the Congress would have repealed Section 612 when it enacted Section 628. In fact, Congress did the opposite: it strengthened Section 612. Moreover, the fact that some programming networks are not owned by cable operators is no answer to the diversity point: cable operators still retain sole discretion whether to carry those programmers or not. The fact remains that, outside of leased access, only operators decide what the viewing public gets to see, and operators -- and the programmers they favor (affiliated or not) -- are willing to fight hard to preserve that bottleneck monopoly.

The Commission must resist that pressure and quash once and for all the industry's specious argument about what Congress meant by diversity in Section 612. Providing for multiple editorial voices is the only way to ensure that cable subscribers will at least have the opportunity to watch programming that is the product of editorial control other than the operator's. And ensuring the growth and development of leased access is the only way to loosen the operator's monopolistic, bottleneck grip on subscribers' options.

Indeed, the establishment of true diversity is more important than ever. In 1984, the industry was still largely composed of a patchwork of small and medium-sized companies. Today, the large MSO's are far more powerful than in 1984 and extending and concentrating their reach almost daily. The top four MSO's alone decide what 60% of the cable-viewing public gets to see, guided and restrained solely by their own judgment.[1] Cable operators like to believe that they have some special insight into what the public wants to see. They may often be right, but that is hardly a basis for affording them the exclusive right to exercise such insight. The simple truth is that no one has a monopoly on accurately assessing the preferences of the viewing public. Cable operators often err. TELEMIAMI is a perfect example. In the heavily-Hispanic Miami area, there has long been a relative lack of Spanish-language and other Hispanic programming. We have been filling that gap, not because of, but <u>in spite of</u> the resistance of some cable operators in our area -- particularly TCI.

We also note that the increasing concentration of the cable industry means that cable operators are trying to deal only with large national networks whenever possible. Local programming is increasingly of less importance in the business plans of the large MSO's, even though demand for it is as high as ever. By its very nature, leased access can fulfill that purpose and add value for subscribers and operators. Operators resist because of their institutional desire to retain control over all aspects of their operations and their inability to

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[1] "Cable Trading: A Big Deal," <u>Broadcasting & Cable</u>, March 11, 1996.

determine unique local market preferences due to their practice of making as many decisions as possible at the corporate headquarters level.

A properly functioning leased access market will increase the likelihood that viewers will truly get programming they want and enjoy. With the passage of the Telecommunications Act of 1996, the Commission is in the midst of a grand adventure in the promotion of competition throughout the telecommunications industry. It would be ironic -- and unfortunate -- if the Commission were to fail to promote competition in the very area where bottleneck control seems most intransigent: editorial control over cable television viewing.

II. EVEN CABLE OPERATORS NOW ADMIT THAT THE IMPLICIT FEE FORMULA IS FUNDAMENTALLY FLAWED.

Cable industry commenters fight a desperate rear-guard defense of the implicit fee formula because they know that the implicit fee formula is so distorted that no programmer could afford to pay the full rate for a channel and survive. Indeed, TCI all but concedes as much: It argues that the implicit fee should be continued because it is sufficiently high to discourage what TCI fears will be increased use of leased access by home shopping and infomercial channels. TCI's cure is to kill the patient: Set the maximum rate sufficiently high to discourage home shopping -- and thereby <u>all other forms</u> -- of leased access, and allow TCI unfettered discretion to discriminate among leased access programmers -- in other words, to restore TCI's complete editorial control over the system.

Contrary to the claims of TCI, Time Warner. and others, however, it is not the economics of the cable industry, but the implicit fee formula that has made it impossible for leased access to grow and develop.

A. The Cable Industry Has Completely Failed in its Efforts to Show That the Implicit Fee Formula Does Not Double-Count Subscriber Revenues.

The FNPRM rightly recognizes that the implicit fee formula leads to double-counting of subscriber revenues. As we demonstrated in our ex parte comments filed with the Commission on July 6, 1994, even an established, successful programmer like CNN could not afford to pay the implicit fee and stay in business.

Cable operators insist, however, that there is no double-counting because they believe the windfall amount in the implicit fee represents some sort of proxy for lost value to the operator. In fact, however, these arguments are all flawed.

Operators have come up with various formulations that supposedly describe the lost value that must be compensated -- but these formulations are all speculative and indeterminate -- and they bear no relation to the original rationale of the implicit fee formula. Adelphia is at least honest when it admits that the implicit fee is "arbitrary." Adelphia Comments at 7. Other operators try to "prove" that the implicit fee formula is correct by inventing post hoc rationalizations to justify the double-counting. Most argue that the implicit fee represents the allegedly "lost" opportunity costs that the Commission chose not to include in its calculations under the cost/market formula. The Commission was right to exclude those costs under the new formula because they are simply impossible to quantify. Consequently, the implicit fee formula, to the extent it also attempted to account for all those "costs," must be scrapped.

The National Cable Television Association ("NCTA") argues that if there were any double-counting, operators would be carrying their regular programming as leased access programming, so that they could collect the subscriber revenue and at least a nominal fee from the programmer. NCTA Comments at 19-20. NCTA goes on to say that the fact that operators have not leased out their channels is proof that some costs are being overlooked. But NCTA ignores the obvious.

First, NCTA overlooks what TCI terms the "economics of leased access" but is really the economics of advertiser-supported cable programming: cable operators do not carry other programmers as leased access programming because none of those programmers could possibly afford to pay the implicit fee, and the operator would have no programming to carry. This does not mean, however, that if a less blatantly exorbitant fee mechanism were established, leased access programmers could not survive. TELEMIAMI, for example, has paid fees to operators for carriage, and it has been distributing its programming since 1988. Thus, the right leased access programmer in the right place can succeed even if it is paying the operator for carriage, as long as the fee is not grossly excessive like the implicit fee.

Second, NCTA fails to consider that operators value their monopoly editorial control extremely highly. They will pay favored programmers that they want to carry, but then will simply not deal with anybody else.[2] As monopolists, they can afford not to: If you don't play their game, you don't play at all. Whether the value operators place on control is accurately represented by the implicit fee formula is irrelevant, and even if the formula were

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[2] See Comments of Broadcasting Systems, Inc. at 11, Comments of R.K. Production Co. at 1-2; Comments of Sunbelt Video, Inc. at 1-2.

an accurate measure, that would be happenstance. The implicit fee formula is convenient for operators because it renders the economics of leased access totally unworkable, which is what operators want.

Operators are not interested in collecting leased access revenue because they see leased access as a threat to their larger interests of retaining bottleneck control, a threat that must be eliminated at any cost. Operators firmly believe that they and only they must be allowed to decide what their subscribers can watch. Congress has disagreed with this judgment in Section 612, but so far operators have been able to resist it. In addition, programmers have their own interests in programming. A successful leased access industry would threaten those interests because leased access would take up channel space that could be occupied by the operator's own programming. Finally, the Commission should not discount the psychological factors involved. Cable MSO's are largely headed by men who struggled long and hard to build their companies under admittedly difficult conditions. They did it by being tough and uncompromising. Now that they have succeeded, old habits die hard. Operators make plenty of money as it is, and they are willing to give up a little revenue to preserve control.

As an example of the importance of control to operators, we offer a story on retransmission consent negotiations that appeared in the May 27, 1996, issue of Cable World: Apparently, several programmers, including the History Channel and Court TV, had been considering teaming with certain broadcast stations in retransmission consent negotiations. The cable industry quickly moved to nip this idea in the bud. '"We have a good relationship with you," one top MSO programming chief says he told his History

Channel affiliate rep. "But the day you attempt to force carriage through an alliance with a broadcast network, that will be the end of it."' Id. at 35. Another MSO made a similar statement: '"We're scheduled to launch History [in several hundred thousand] homes this year because we want to, not because we have to," says a programming chief at a top 20 MSO who requested anonymity. "But if they're going to play [the retransmission] card, we can change the launch schedule." Id.

This reluctance to give up any control is neither surprising nor irrational. But it certainly puts the lie to cable operators' claims that they make programming carriage decisions based only on an assessment of viewers' preferences. And operators' desire to retain bottleneck control is against the intent of Congress, and ultimately against the interests of subscribers. The Commission cannot assign any significant value to the desire to retain control, or it will have rendered Section 612 a dead letter.

B. Cable Operators Finally Concede What TELEMIAMI Has Pointed out all Along: Even the Most Popular Programmer Could Not Succeed if it Had To Pay the Exorbitant Leased Access Rates Imposed Under the Implicit Fee Formula.

As we have mentioned above, the implicit fee formula results in rates so high that even a successful and popular programmer, such as CNN, could not afford to pay them. For the first time, Time Warner, TCI and other operators admit that this is the case, albeit indirectly. TCI attempts to argue that "the economics of leased access" are doomed to failure. TCI Comments at 5. And Time Warner asserts that leased access cannot succeed because programmers cannot succeed if they must pay operators for carriage. Time Warner Comments at 2.

What these admissions fail to note, however, is that it is the economics of the implicit fee formula that have hamstrung leased access. The transition between receiving affiliate fees from operators and paying leased access fees to operators is not a magic dividing line that guarantees a programmer's success or failure. There is a middle ground, in which a programmer may pay nominal fees to the operator and still survive.

TELEMIAMI is living proof that an advertiser-supported, non-home shopping programmer can survive even if it does not receive any affiliate fees and instead pays an operator for carriage. But we could not survive if we had to pay rates under the implicit fee formula. Nor, as the industry now concedes, could anybody else. Therefore, the implicit fee formula must be abandoned if the Commission is to comply with the statutory mandate. Congress meant for leased access to work in some fashion, and it is up to the Commission to find a way.

C. The Only Justification for the Implicit Fee Formula is to Keep Leased Access Rates Prohibitively High.

Once again, operators like the implicit fee formula because it guarantees high rates, which in turn guarantees that nobody can pay them. To its credit, TCI is remarkably candid about this point. For instance, TCI urges the Commission to set leased access rates high enough to keep home shopping and infomercial programming -- and, as a result, any other type of programming -- off of leased access. Then, in the next breath, TCI asks for discretion to negotiate lower rates with those leased access programmers it chooses. Comments of TCI at 25-28. In other words, TCI wishes to retain complete editorial control.

As an initial matter, based on our own experience with TCI, we find it hard to believe that TCI would use this right to discriminate for the betterment of mankind. TCI wants to be able to keep rates high to keep leased access programming off its systems, except in those rare circumstances when, in its sole judgment, TCI might find some value to a program.

More fundamentally, TCI's cure would kill the patient. A more logical way to deal with TCI's concerns about the "economics of leased access" and the possible proliferation of home shopping and infomercials on leased access would be the one TELEMIAMI proposed in its opening comments: Retain the current separate categories of leased access programmers.

D. The Average Channel Rate Proposal Does Not Correct the Flaws of the Implicit Fee Formula.

Several industry commenters have proposed modifying the implicit fee formula so that, instead of using the affiliate fee paid to the least-favored programmer to calculate the rate, the formula would rely on the average affiliate fee. See, e.g. Comments of Discovery at 10-12. NCTA goes a step further and calls for a markup over the average affiliate-based fee. Comments of NCTA at 21-24. But these proposals fail to cure the fundamental defects of the current formula. There is no correlation between the average affiliate fee method and any actual value of the channel to the operator. The new proposed formulas will also still result in double-counting of subscriber revenues. And, while the proposals might result in rates somewhat lower than the current formula, the reduction would be small, since most affiliate fees are much smaller than monthly per channel subscriber revenues. If the formula does not eliminate double-counting, does not improve the viability of leased access, and bears no greater relationship to reality than the current formula, it is of no value and it would make no sense to adopt it.

The NCTA proposal is particularly insidious. because the amount of the operator's mark-up -- 11.25% -- is probably not far from the average affiliate fee operators pay. Thus, the proposal is ultimately nonsensical. Still, the mere fact that NCTA and other industry members would submit an alternative is a tacit admission that they recognize that the implicit fee formula is fundamentally flawed, a point we have been striving to make for years. Since the Commission, the leased access industry, and the cable industry are now agreed on that fact, the implicit fee formula -- and anything related to it -- should be eliminated.

III. THE COST/MARKET PROPOSAL, AS MODIFIED BY TELEMIAMI'S PRESUMPTIVE NOMINAL RATE APPROACH, ADDRESSES THE ALLEGED CONCERNS OF THE CABLE INDUSTRY.

In our initial comments we pointed out some potential problems with the new cost/market proposal, and suggested our own alternative. We believe the cost/market proposal is a marked improvement over the implicit fee formula, but we fear that its complexity will allow operators to manipulate their calculations. Therefore, we again urge the Commission to establish a presumptive nominal rate of no more than $0.05 per subscriber per month for non-premium and non-home shopping leased access programmers, and allow operators who can prove that their costs are higher under the cost/market formula to rebut the presumption that the nominal rate should apply.[3] As discussed below, this proposal would also resolve many of the industry's criticisms of the proposed cost/market formula.

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[3] This proposal, or something similar to it, was also submitted by other commenters. See, e.g., Comments of Blab Television Network, Inc. at 6-8; Comments of the Vacation Channel, Inc. at 3; Comments of Broadcasting Systems, Inc. at 2.

A. The Presumptive Nominal Rate Approach Guarantees that Operators Will Receive Some Compensation for Every Leased Access Channel.

Several industry commenters have objected to the cost/market formula on the ground that they believe it will lead to negative rates, meaning that cable operators would not be entitled to any compensation from leased access programmers. As a preliminary matter, we note that any such claims by the industry should be viewed with some skepticism; even if the calculations have been performed correctly, the fact remains that by merely changing the set of channels to delete, an operator can arrive at different leased access rates. Thus, there is no guarantee that in actual practice an operator would not choose a different set of channels and claim a much higher rate.

Nevertheless, even taking various industry calculations at face value, our presumptive nominal rate approach disposes of the problem. If the Commission were to set a nominal fee per subscriber that every leased access programmer had to pay, there would be no noncompensatory or negative leased access rates. Every operator would receive some compensation from every leased access programmer. Furthermore, if an operator thought its costs were actually higher than the nominal fee, it would still have the right to try to rebut the presumption with actual data.

B. The Cost/Market Proposal Does Not Underestimate Operator's Costs.

The cable industry's principal objection to the new cost/market formula is the claim that it does not accurately reflect all of an operator's costs, particularly its opportunity costs. We disagree. If there is anything wrong with the cost/market formula, it is that it overestimates an operator's true costs.

In any case, the cable industry's complaint about the proposed formula's failure to account for all opportunity costs appears in two guises: (i) having leased access on a system causes the operator to lose revenues; (ii) the loss of the ability to control or program the leased access channels is a cost that should be compensated. Neither argument withstands scrutiny.

1. Operators Will Still Receive the Same Amount of Revenue, if not More.

Operators have nothing to complain about under the cost/market formula. They will still receive the same amount of revenue from subscribers, earn additional new revenue from the leased access programmer, and pay less affiliation fees. As the FNPRM notes and we have discussed above, anything else is pure, unquantifiable speculation.

With the exception of premium channels, operators sell subscribers packages, not channels. Therefore, subscribers cannot drop individual channels, and operators will still receive the same amount of subscriber revenue for a package that includes leased access channels. The only case in which this would not be true is if subscribers canceled their subscriptions in response to the replacement of particular existing channels with leased access channels.

At the margin, however, exchanging one channel for another has a minimal effect on revenues and on the operator's costs. The truth is that most subscriber viewership is disproportionately concentrated in a handful of channels, and that subscribers value a few of those channels very highly, and place very little or no value on others. See Comments of

Cox Communications, Inc. at 6.[4] Indeed, most subscribers would pay little or nothing for most of the channels they receive on a system. As monopolists, operators have always charged what the market will bear for their packages, and from the subscriber's perspective the vast majority of that charge pays for only a few channels. Subscribers will pay about $20-$30 a month for basic and CPS tiers, no matter what is in the package, as long as it contains a few key services.

This means channel changes at the margin will have little effect on the demand for the entire tier. Thus, the argument that adding leased access will cost operators any significant revenue through lost subscribers is simply false.

To contend otherwise, operators must supply sound evidence that leased access reduces revenues. Continental and TCI have enclosed subscriber surveys with their comments, and TCI, Time Warner and NCTA have enclosed economic studies that they claim address this issue. None of the commenters however, has actually conducted any valid, objective analysis of the effects of leased access on subscriber penetration and system revenues. The subscriber surveys are of no value because they do not accurately predict what subscribers will do, and they are deliberately skewed to achieve the operator's desired results. For example, the first question in the Continental survey reads:

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[4] Cox, for example, notes that subscribers value some channels more than these channels' pro-rata share of the retail price of the tier service. While that is no doubt true, Cox -- and the industry overall -- overlook the corollary of that proposition. If some channels are more highly valued, that necessarily means that subscribers value other channels on the tier far <u>less</u> than that channel's pro-rata share of the price. These are the channels that a rational operator -- or at least a rational operator not trying to put political pressure on the FCC to punish it for implementing leased access -- would drop.

> Leased access channels are channels that are required to be carried by your cable company. These channels are available to the public so that someone can buy air time on a channel. *Unlike the channels which are selected by your cable company based upon expected popularity*, these channels are programmed at the sole discretion of the person buying the time. *Typically, this programming focusses on various topics such as infomercials, home shopping, and ethnically-oriented programs.* On a scale of 1 to 10, where TEN means "very appealing" and ONE means "not at all appealing" how appealing is this type of programming to you?

Comments of Continental Cablevision, Inc. at Attachment 2 (emphasis added). On its face, this question is clearly designed to elicit a negative response. It assumes that the operator makes programming decisions based exclusively on expected viewer popularity (which is not true), and that leased access programmers do not make decisions based on expected viewer popularity (also not true). Then the question contains leading references to infomercials and home shopping -- references transparently intended to elicit an unfavorable reaction from the average cable subscriber. Thus, this survey is unreliable from the outset.[5]

The economic analyses relied on by Time Warner, TCI and NCTA are likewise of little value. They are long on rhetoric and short on science. If the industry or the Commission wish to measure the real effects of leased access on cable systems, there is a far more direct way to do so. One way would be to conduct a statistical analysis to determine whether, properly adjusting for other factors, there is any statistical difference in subscriber penetration or profitability between those systems that carry leased access programming and those that do not. A similar analysis could be done to compare systems with different numbers and kinds of leased access channels. This information is readily available, at least in terms of subscriber penetration, and a statistically valid study could probably be done

[5] The TCI survey is not as blatantly biased, but it is by no means intended to elicit a favorable response regarding leased access.

using Time Warner and TCI systems alone, provided that those operators provided reliable data and were to submit to independent analysis and review. Of course, we would recommend that the Commission -- as a neutral party -- undertake such a study.

In any case, such an analysis, if properly and objectively conducted, would be a far more reliable indicator of whether leased access actually has a negative effect on subscriber levels or profitability. We suspect that the answer would be that the presence of leased access channels on a system has no statistically significant effect -- or even any significant effect at all. Unless actual harm can be shown by means other than anecdote, slanted survey questionnaires, and unsupported rhetoric, the Commission is right to treat the matter as speculative and not worthy of further consideration.

Having said that, however, we would like to cite two instances of anecdotal evidence to support our own views. First, we note that Time Warner's Manhattan system is well-known for its many leased access channels. Although Time Warner complains that it cannot add more channels of its own choosing because of its current leased access commitments on the system, the fact remains that Time Warner has not -- and cannot -- claim that the system is anything but an extremely valuable and lucrative system, the jewel in Time Warner's crown.

Second, we also note that as part of the industry's argument that leased access causes loss of subscribership, operators are very quick to characterize all leased access programming as undesirable or of low quality (despite the industry's inconsistent admission that even high quality programming could not survive paying for carriage due to the "economics" of cable programming). For example, in our litigation with TCI and Gold Coast, cited in our initial